

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

26408

FILE: B-210182

DATE: September 29, 1983

MATTER OF: Joule Maintenance Corporation

DIGEST:

1. Protest of an A-76 cost comparison filed with GAO within 10 days after the protester received the agency's decision on its appeal under the agency's administrative review procedure, but more than 10 days after the protester had been telephonically informed of the decision's outcome, is timely where the details of the decision were not known to the protester until the decision was received.
2. To prevail in a protest against the results of a cost comparison upon which the agency based its decision to retain function in-house, the protester must demonstrate not only a failure to follow established cost comparison procedures, but also that such failure materially affected the outcome.
3. A statement of work in the solicitation is inadequate where it states that offerors are only to include the cost of work being performed by the in-house work force, but does not indicate that the in-house work force is not performing certain work which seems to be encompassed by the statement of work.

Joule Maintenance Corporation protests the Navy's rejection of its bid under solicitation N62472-82-0013, the second step of a two-step procurement of basic operation support services at the Navy Ships Parts Control Center (NSPCC), Mechanicsburg, Pennsylvania. Such support services, currently provided by Government personnel, includes all labor, materials equipment, transportation, facilities supervision, and management required for the

026821

Public Works Center. This involves facility maintenance and repair, construction, and alteration; equipment installation; utility system operation and maintenance; maintenance of military family housing; operation of automotive and weight-handling equipment and of the fueling station; and pest control and grounds maintenance services. The Navy had solicited offers for the purpose of determining whether to perform the work in-house or by contract based on the cost comparison procedures contained in Office of Management and Budget (OMB) Circular A-76 and the attendant Cost Comparison Handbook (Handbook). The cost comparison resulted in the Navy's determination that it would be less costly to perform the function in-house. The protester alleges that the Navy failed to adhere to the Handbook's procedures.

We deny the protest in part and sustain it in part.

The results of the cost comparison were that the cost to the Navy of contracting with Joule (\$22,297,776) would exceed the in-house cost by \$3,475,715 for a 3-year period (1 base year and 2 option years). Joule timely appealed for an administrative review of the comparison within the contracting agency. Upon appeal, the Navy acknowledged several errors and revised the comparison but the result still showed in-house performance to be \$2,884,707 less costly than contracting.

Joule argues that the errors disclosed in the appeal should provide sufficient reason by themselves to invalidate the cost comparison. The firm also specifies three alleged defects in the cost comparison that Joule had raised in the agency appeal and which were not resolved to its satisfaction. Joule complains that the Navy failed to calculate correctly the Government's indirect costs of management (Operations Overhead and General Administrative Expense) above the level of the Public Works Center to reflect alleged savings the Navy would realize by contracting. The protester also argues that the Navy overstated the costs of severance pay and retained pay it would have to pay separated or downgraded Government personnel if a contract were awarded. Third, the protester complains that the Navy, in calculating in-house costs, failed to take into account the costs of work performed by commercial contractors in support of the Government's in-house performance.

Joule also raises a fourth matter, which was not raised on appeal: that the Navy required Joule to pay at least minimum wage rates under the Davis-Bacon Act for 51,496 hours of construction, but did not estimate its in-house costs using those rates.

Timeliness

The Navy asserts that this protest is not timely. The Navy's decision on Joule's appeal was signed and mailed on November 24, 1982, and was received by Joule on December 1. Our Bid Protest Procedures require that a protest to this Office be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2)(1983). In apparent compliance with our procedures, Joule filed its protest here on December 14, 1982, that is, 9 working days after Joule received the Navy's decision on the appeal. The Navy, however, states that its counsel telephonically informed Joule on November 29 that the appeal had been denied and gave Joule the corrected calculated amount the Navy would save by retaining the function in-house. According to the Navy, Joule therefore should have filed its protest within 10 working days after the phone call, that is, on December 13. We disagree.

We previously have held that where, as here, a relatively speedy review procedure formally is included as part of the administrative decision-making process, the administrative decision is not final until the review procedure has been exhausted, and therefore a protest filed with this Office prior to the final decision would be premature. Direct Delivery Systems, 59 Comp. Gen. 465 (1980), 80-1 CPD 343 (regarding A-76 Handbook cost comparison). Since in this case the administrative review procedure terminated with the issuance of a written report analyzing the appeal and revising the cost comparison, we believe that until the protester was apprised in detail of the contents of the report the firm lacked either actual or constructive knowledge of a basis for protest. The protester only attained such knowledge on December 1, when it received the appeal decision; the November 29 telephonic advice involved only the bottom-line figure, not the detail and analysis involved in reaching it. Therefore, we view the protest as timely.

Standard of Review

The decision whether to perform work in-house or by contract involves a matter of executive branch policy which we generally do not review under our bid protest function. When, however, an agency utilizes the procurement system to aid its decision--soliciting offers and spelling out the circumstances under which a contract will or will not be awarded--we will review an allegation that the agency did not comply with the ground rules established by the solicitation. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317. Those ground rules generally are set out in the solicitation, the Handbook, and the particular agency's implementing procedures.

We review alleged violations of the ground rules because it would be detrimental to the procurement system if, after the agency induces the submission of offers, there is a faulty or misleading cost comparison that materially affects the decision whether or not to contract. Serv-Air, Inc.; AVCO, supra. Therefore, the protester--which generally bears the burden of proving its case--must demonstrate not only that the agency failed to follow mandated procedures, but that the failure materially affected the cost comparison's outcome. MAR, Incorporated, B-205635, September 27, 1982, 82-2 CPD 278. The mere fact that the agency's administrative review panel acknowledged certain errors in the cost comparison does not in itself provide a valid basis to challenge the comparison's results. Id.

Management Costs

Joule complains that the Navy failed to include in its in-house estimate any overhead costs or general administrative costs for management personnel of a level above the work center, or to cost their decreased work effort as a result of contracting. We recently held that where the cost of indirect support services would be the same for in-house performance and contract operation, as the Navy states would be the case here, the cost for those services properly may be excluded from the in-house estimate. Contract Services, Inc., B-210976, August 29, 1983, 83-2 CPD ____; TS Infosystems, Inc., B-209900, August 2, 1983, 83-2 CPD _____. That decision was based on language in a January 26, 1982 revision to paragraph 9(3) of OMB Circular No. A-76 (Transmittal Memo No. 6) stating, "Costs that would be the same for either in-house or contract operation

need not be included in the cost comparison." Since the Navy concluded that no management positions would be excluded for contract operations and the protester has not shown the Navy's conclusion to be unreasonable, we find this basis of protest to be without merit.

Severance Pay and Retained Pay

The protester objects to several aspects of the Navy's computation of the severance pay and retained pay that the Navy would have to pay if it contracts. To compute the necessary amount of severance pay, the Navy conducted a mock reduction in force (RIF) of the 173 employees in the Public Works Center.¹ The Navy determined that the RIF would result in 33 separations with severance pay and 41 placements requiring grade and pay retention. The remaining employees were deemed retired, placed in a vacant position, or offered jobs by the contractor. The Navy assumed, based on a previous base operations support contract conversion at Fort Gordon, Georgia, that the contractor would employ 45 percent of the separated employees. The Navy also determined that the placement of retained employees would result in 3 displacements and 31 separations elsewhere in the NSPCC which should be included in the cost comparison; for this purpose, the Navy assumed the contractor would not hire any non-Public Works employees. After reviewing the effects of contracting on both the Public Works Center and elsewhere at the NSPCC, the Navy concluded it would have to pay severance pay to a total of 105 employees and retained pay to 44 employees.

Joule objects to the Navy's assumptions that it would hire only 45 percent of the available released Public Works employees, and to the assumption that it would not hire any available non-Public Works employees.

We believe these objections lack any merit. The Navy reasonably based the 45 percent factor on a similar conversion, and the protester has failed to submit any

¹The Navy's appeal team noted that the cost comparison should have been based on a projected 170 employees in the Public Works Center since that was the most efficient organizational level recommended in a recent management study. The team found, however, the effect of this error to be insignificant.

evidence why that conversion is not analogous to the one here, or any evidence of other conversions that would support the use of a greater percentage. The Navy's assumption that the contractor would not make any job offers to the non-Public Works employees displaced in a RIF also seems reasonable since such employees lack the specific skills and experience of the Public Works employees. The protester has submitted no evidence showing that these employees, who lack the specific skills required by the solicitation, would be hired. Thus, the protester merely disagrees with Navy's position regarding the number of separated employees who would be hired by the contractor. Mere disagreement with the agency's position does not meet the protester's burden to prove its case. MAR, Incorporated, supra.

Joule also complains that the Navy did not calculate these labor-related conversion costs in accordance with Transmittal Memo No. 6, which provides a model for calculating the Government's costs of separation pay and retained pay. Basically, the model requires the agency to determine first how many employees will be separated (not including those who voluntarily resign or retire) and will not be employed by the contractor, and to calculate severance pay for those employees. The last step is to calculate the retained pay of those persons who would be downgraded as a result of the conversion.

Joule, apparently assuming that the model only contemplates using the number of employees in the work center, criticizes the inclusion of the costs of severance pay and retained pay for employees outside the work center who would be displaced as a result of a contract conversion. Nothing in the Handbook or the Transmittal Memo, however, prohibits using a mock RIF to compute labor-related costs of all the personnel to be separated or displaced as a consequence of the conversion. In fact, it is the Handbook's stated policy that all significant Government costs must be considered. Chapter I.D. It appears from the record that applying the Transmittal Memo's model for calculating labor-related conversion costs to all the employees affected by the mock RIF would result in the same costs as the Navy included in the cost comparison. Since the contract conversion would affect not just the 170 employees in Public Works, but 53 other employees (of which 31 would receive severance and 3 retained pay), the appeal team's calculation under step 1 included 223 persons, not 170.

The effect on all these people was considered, and it was found that 105 of them would receive severance pay and 44 would receive retained pay. The protester has failed to show that the Navy's approach violated any established ground rules.

The protester also argues that the 45 percent factor representing the expected percentage of separated employees to be hired by the contractor should be applied to displaced employees also. Because such employees would remain employed by the Government, however, there is no reason to assume they would be hired by the contractor. Moreover, Transmittal Memo No. 6 only requires that the percentage factor be applied to "separated" employees and not to employees receiving retained pay.

We thus conclude that the protester's complaints regarding labor-related conversion costs of the Government lack merit.

Commercial contracts

Joule contends that the Navy has significantly understated its in-house estimate by failing to include the cost of contracts with private firms covering work encompassed by the statement of work. The protester's argument is based on its examination of an allegedly incomplete list of fiscal year 1981 contracts to perform Public Works functions.

The Navy's decision on the appeal responded to this complaint by explaining that in-house personnel are used to perform work such as operation of utility systems that require continuous operation and routine maintenance and also to perform minor repair and construction work. Historically, most minor repair and construction work consisted of jobs costing less than \$10,000, while larger construction jobs and jobs requiring specialized types of work at the NSPCC were performed by independent contractors. Other in-house tasks were restricted to jobs costing less than \$40,000 per year. The Navy states that the solicitation was intended to include only that work which traditionally had been performed by in-house personnel. The Navy thus contends that the other contract work falls outside the scope of the work that Joule would be obligated to perform if awarded this contract.

We find no basis for disputing the Navy's claim that it did not intend to include major tasks under the statement of work. This being the case, however, we find that the solicitation did not adequately apprise offerors of the

types of tasks which were performed by contract rather than by the in-house employees, and that this deficiency could have misled the competitors into providing for those tasks in their offered prices.

The limited scope of the contractor's duties and the factors determining when work would be performed by other contractors were not explained to the offerors. On the contrary, for the most part the specifications were written very broadly so that any offeror reasonably could interpret them as requiring the contractor to accomplish practically the entire Public Works function. In a recent decision in another Joule protest, we held that similar language was not an adequate substitute for the precise, unambiguous description of work to which offerors are entitled. Joule Maintenance Corporation, B-208684, September 16, 1983, 83-2 CPD ____.

We cannot tell from the record, however, whether Joule was prejudiced by this deficiency. Joule asserts that its lump sum prices for various work elements included amounts for jobs the Navy says were not meant to be included in the scope of work. The record indicates that this work has been encompassed by 20 commercial contracts. Neither Joule nor we have been provided with information concerning those contracts, so we cannot determine whether the value of those contracts is such that Joule's inclusion in its bid price of the work represented by them distorted the result of the cost comparison. (In this respect, we note that the total amount would have to be substantial in view of the currently-perceived \$2.9 million difference in cost between contracting and in-house performance.) We therefore are recommending to the Navy that it determine, based on the value of these contracts, whether the cost comparison, finding in-house performance to be less costly, is valid. If the Navy finds that the results of the comparison were distorted, the Navy should issue a new solicitation which clearly indicates to offerors the work covered by the statement of work.

Davis-Bacon Act Rates

Finally, the protester alleges that the Navy required Joule to base its offer on providing 51,496 hours of construction subject to minimum wages under the Davis-Bacon Act while not using such wage rates to determine its in-house estimate.

There is no merit to Joule's argument. The Government does not pay its employees Davis-Bacon wage rates. Thus,

B-210182

the Government's true cost for construction performed in-house is its employees' salaries.

The protest is sustained.

for *Shilton J. Jordan*
Comptroller General
of the United States